IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

BRYANT MOORE, JR., BY HIS NEXT FRIEND AND FATHER, BRYANT MOORE, SR.,	)	
PLAINTIFF/RESPONDENT,	)	Appeal No. ED79994
v.	)	
BI-STATE DEVELOPMENT AGENCY,	)	
DEFENDANT/APPELLANT.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

THE HONORABLE JIMMIE M. EDWARDS
CIRCUIT JUDGE, DIVISION FIVE

SECOND BRIEF OF APPELLANT
BI-STATE DEVELOPMENT AGENCY, INC.

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TABLE OF CONTENTS

Abbreviations:

Appellant's Brief: "A."

Respondent's Brief "R."

TABLE OF AUTHORITIES

Page

Cases:

Page

Other Authorities:

REPLY STATEMENT OF FACTS

Defendant Bi-State Development Agency submits the following additional statement of facts to address several misstatements of fact in Plaintiff Bryant Moore, Jr.'s brief.

Moore asserts that he had "two year's of limited experience riding buses and the Metrolink as well as crossing some busy streets unsupervised." (R. 10). The evidence does not support Moore's claim.

Moore's parents testified that he had been riding buses, taking the Metrolink, and crossing busy streets since the age of eight or nine. (T. 365, 496-97). At the time of the accident, Moore was fourteen and one-half years old. (T. 497). Moreover, Moore's mother entrusted him with supervising his younger sister during his trips to St. Louis Centre by Metrolink. (T. 364-65). Finally, Moore had been taking the Bi-State bus to his high school almost every school day since August 1998. (T. 359-61).

Moore also insists that Arcadio Aburto was the "only eyewitness." (R. 11, 22, 30, 33). As to the actual collision between Mr. Crowell's truck and Moore, Aburto, Mr. Crowell, and Mrs. Crowell were eyewitnesses. As to the location where Moore exited Bi-State's bus and the events immediately preceding the accident, Bi-State's driver, Carl Stroughter, was also an eyewitness.

Finally, Moore asserts that Caseyville Road has no road shoulder at the point of disembarkation. (R. 11, 22). One need look no further than Plaintiff's

Exhibit No. 16 attached as an appendix to Moore's brief to see that this is not the case. (R. Appendix).

REPLY ARGUMENT

I. The trial court erred in denying Bi-State's Motion for Judgment Notwithstanding the Verdict, because Plaintiff Bryant Moore, Jr., failed to make a submissible case against Bi-State, in that Bi-State owed Moore no duty at the time of his accident, because the passenger-carrier relationship had previously terminated once Moore exited the Bi-State bus in safety.

The trial court's judgment in Moore's favor should be reversed as a matter of law. At the time of the accident, there was no passenger-carrier relationship between Moore and Bi-State. Moore's arguments do not compel a contrary conclusion.

Moore begins his response with a fact misstatement. He asserts that Bi-State's driver, Carl Stroughter, admitted that the place of discharge was unsafe. (R. 23, 28, 59). However, Stroughter did not so testify. Consider Stroughter's testimony:

> Q: And then you stopped further up the road towards Morrison, right?
>
> A: No sir….
>
> Q: In other words, you think it's inappropriate to let somebody off further up the road?
>
> A: Yes.
>
> Q: You shouldn't let somebody off up here where Mr. Aburto says you stopped, is that right?

* * *

Q: Do you feel that that would be an inappropriate place to stop as a bus driver of all your years of experience because there is no shoulder there for them to walk?

A: Yes. But I stopped back here.

Q: I understand that. I asked you if that's an appropriate place to stop.

A: Yes, sir. (T. 556-57).

Stroughter's testimony demonstrates that he did not admit to discharging Moore in an unsafe location. Rather, Stroughter's testimony is consistent with the physical evidence, Aburto's prior deposition testimony, and Aburto's statement to police that Stroughter stopped the bus at a safe location directly across from the school service road entrance. (T. 556-57, 565, 568-69, 574, 580-82, 593-95).

In his appendix, Moore includes aerial photographs of Caseyville Road, which were admitted into evidence. (T. 403, 433). Consistent with the Court's analysis in *Sanford v. Bi-State Dev. Agency*, 705 S.W.2d 572, 573 (Mo.App. E.D. 1986), these photographs show that Moore had a safe place to alight and then to wait in safety for passing traffic to clear.

Moore also argues that he made a submissible case on duty based on *Sims v. Chicago Transit Auth.*, 122 N.E.2d 221, 225 (Ill. 1954). Moore cites *Sims* for his claim that Illinois law has long held that dropping off a passenger in the middle of a block alongside a lane of moving vehicles that have the right of way is not

necessarily a place of safety. (R. 24). The holding in *Sims* does not advance Moore's position. The case's holding does not provide that such a place is necessarily unsafe or that a designated bus stop is a place of safety under all circumstances as a matter of law.

Moreover, Moore declines to address the holdings in *Crutchfield v. Yellow Cab Co.*, 545 N.E.2d 961 (Ill.App. 1989), and *Mitchell v. City of Chicago*, 583 N.E.2d 60 (Ill.App. 1991). In each case, a bus stopped and the passenger safely exited. In each case, the stop was in the middle of a block, and the passenger's destination was on the other side of the road. In each, the passenger had to cross the street and was struck by oncoming traffic. And in each, the passenger was initially safe from oncoming traffic at the point of disembarkation. Consequently, in *Crutchfield* and *Mitchell*, the courts held the passenger-carrier relationship and the carrier's duty had ceased to exist. *Crutchfield*, 545 N.E.2d at 963; *Mitchell*, 583 N.E.2d at 62.

The result in this case should be no different. Moore safely exited the bus. He also had to cross the street regardless of the stop's location.

Moore attempts to distinguish *Crutchfield* and *Mitchell* on the ground the passengers in both cases exited at designated bus stops. (R. 25). His distinction is one without a difference. The danger in *Crutchfield*, in *Mitchell*, and in this case was oncoming traffic. In each case, the passengers were safe where discharged from oncoming traffic. Nothing required them to cross the street until it was safe to do so. Such is the case here.

Next, Moore complains of Bi-State's citation to Missouri authority. (R. 25). Moore then cites to Section 300.510.2, R.S.Mo. 2000, and argues that Bi-State had a duty under Missouri law to discharge passengers only at designated bus stops. Moore's reference to Section 300.512.2 should be disregarded. Not only are Missouri legislative enactments inapplicable on Illinois roads, but it is incorrect to say that requested stops are a violation of Missouri statutes. Section 300.510.2 is a Model Traffic Ordinance, to be adopted or not, by various local governments. In no way is it a binding statement of Missouri law.

Moore also cites to *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291 (Mo. banc 1978), for the proposition that a carrier is not absolved from liability just because a passenger is not injured in the very act of alighting and that if a passenger is discharged at an unsafe location, and is injured as a result, the carrier's negligence is the proximate cause of the injury. (R. 26). The facts in *Graeff*, absent from Moore's brief, are so unique that the case distinguishes itself. *Graeff* involved a nine-year-old, mildly retarded boy who was discharged in the *middle* of the street at a time when the bus driver knew an oncoming vehicle was proceeding to pass on the left, yet failed to activate the bus's "stop-arm" or honk the bus's horn or otherwise warn the boy of the known danger. As observed by this Court in *Sanford*, the carrier's duty in *Graeff* did not terminate once the child exited the bus because the dangerous conditions surrounding his discharge arose before he alighted and not after he reached the street. 705 S.W.2d at 576.

Here, no similar facts exist. Moore alighted in safety. He then left his place of safety to cross the street. (T. 374, 438, 441-42, 454, 457-58, 524). Under these circumstances, Bi-State owed Moore no duty as a matter of law. For, at the time of the accident, no passenger-carrier relationship was in existence.

II. The trial court erred in denying Bi-State's Motion for Judgment Notwithstanding the Verdict, because Plaintiff Bryant Moore, Jr., failed to make a submissible case against Bi-State, in that Bi-State's conduct was not the proximate cause of Moore's injuries. Rather, the proximate cause of the accident was Moore's conduct in running across the street from a place of safety into the path of William Crowell's truck.

The trial court's judgment in Moore's favor should be reversed as a matter of law for want of proximate causation. The proximate cause of Moore's injury was his voluntary decision to run across the street into Crowell's truck after safely exiting Bi-State's bus. Moore's arguments do not compel a contrary conclusion.

In response, Moore again cites *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291 (Mo. banc 1978). (R. 29). Absent is any discussion of the unique circumstances in *Graeff*, which distinguish it from this case. Nevertheless, on proximate cause, Moore quotes *Graeff* as holding, "And if the passenger is put off at an unsafe place and is injured in the consequence, the negligence of the carrier is considered the proximate cause of the injury." (R. 29). *Graeff* does not advance Moore's position.

In *Graeff*, the boy was discharged in the middle of the road and was hit in the road. The child never reached a place of safety from oncoming traffic. This case stands in contrast. Moore's own witness, Arcadio Aburto, testified that Moore proceeded to the side of the bus, walking in the grass, entirely off Caseyville Road. (T. 441). Moore was safe from oncoming traffic at that location, unlike the child in *Graeff*. (T. 441-42, 452-54, 458, 538-39).

Moore next cites *Watson v. Chicago Transit Auth.*, 299 N.E.2d 58 (Ill.App. 1973). (R. 30). Clearly distinguishable, *Watson* fails to aid Moore. In *Watson*, a bus failed to pull over to the curb, stopping six feet away. Passengers were subsequently injured because of where the bus parked. In this case, Carl Stroughter's decision to permit Moore to disembark where he did had nothing to do with Moore's accident.

In several places, Moore shows a misunderstanding of Bi-State's proximate causation argument. He argues that Crowell's striking of Moore was not an independent act, breaking the chain of causation. (R. 31-33). Bi-State does not contend that Crowell's conduct was a superseding cause. Rather, Bi-State contends, consistent with the law and the facts, that Moore himself broke the chain of causation by leaving his place of discharge, a place of safety, and then darting across the street without looking. (T. 374, 438, 441-42, 454, 457-58, 524).

Under Illinois law, a carrier has no duty to protect its passengers from obvious street dangers. *Crutchfield v. Yellow Cab Co.*, 545 N.E.2d 961, 963 (Ill.App. 1989); *Mitchell v. City of Chicago*, 583 N.E.2d 60, 62 (Ill.App. 1991).

Therefore, when a former passenger, such as Moore, places himself in danger from vehicular traffic, the carrier's conduct is not the proximate cause of any resulting injury. *See Arbogast v. Fedorchak*, 194 N.E.2d 382, 386-387 (Ill.App. 1963), and *Sanford v. Bi-State Dev. Agency*, 705 S.W.2d 572, 575 (Mo.App. E.D. 1986). For these reasons, the trial court's judgment should be reversed outright as a matter of law.

III. In the alternative and in the event the Court holds Bryant Moore, Jr., made a submissible case against Bi-State, the trial court erred in denying Bi-State's Motion for New Trial, because of juror misconduct during voir dire, in that Jury Foreperson Marian Shands's failure to disclose three claims against Bi-State when questioned about claims during voir dire constitutes intentional concealment of prior claims.

Moore challenges Bi-State's juror non-disclosure argument by initially claiming Bi-State's voir dire examination was unclear. (R. 36). Moore's argument is belied by Bi-State's opening brief, which lays out the voir dire examination on prior claims in detail. (A. 45-50).

Moore then argues that Juror Shands's silence on the three claims did not constitute nondisclosure. (R. 40). He points out that Shands volunteered some information. (*Id.*). This fact, of course, is irrelevant to assessing her failure to disclose three other recent claims against Bi-State.

Next, Moore characterizes the three claims as being "insignificant" due to the limited compensation she received, and the fact Shands did not personally

consider them to be claims. (*Id.*). The amount of compensation is of no consequence. So is her personal view on whether her claims could be characterized as claims or not. *See, e.g., Williams v. Barnes Hosp.*, 736 S.W.2d 33, 38 (Mo. banc 1987).

Moore tries to distinguish *Williams* and *Brines v. Cibis*, 882 S.W.2d 138 (Mo. banc 1994). He suggests *Williams* is distinguishable because the juror there recovered a $1,500 personal injury settlement. (R. 44). He claims *Brines* is inapplicable because the juror in that case had been sued eight times within a six-year period. (*Id.*). Moore's rejection of *Williams* and *Brines* is unpersuasive.

In *Williams*, the juror, like Shands, claimed that he did not remember his prior lawsuit during trial, yet like Shands, his recollection of the details of the prior claim was strong. Similarly, in *Brines*, the juror failed to recall being sued eight times within a six-year period. Again, like Shands, he claimed he did not recall the suits during voir dire.

Contrary to Moore's argument, Shands's case is even more unreasonable than those in *Williams* and *Brines*. She had three other recent claims, two of which resulted in settlements, all of which she recalled with detail, and all against Bi-State.

Moore further asserts that Shands's nondisclosure was neither material nor prejudicial. (R. 45). However, if under *Williams* and *Brines*, Shands's nondisclosure was intentional, the inquiry ends. Prejudice and bias are presumed. *Brines*, 882 S.W.2d at 140.

Moore nevertheless denies prejudice because Shands did not sign the verdict form. (R. 45). He also claims there was no prejudice because Shands divulged one lawsuit against Bi-State. However, Bi-State was not apprised of the sheer number of claims and complaints that she had made against Bi-State. Shands's non-disclosure prevented Bi-State from exercising its right to inquire as to whether these other claims, or whether all her claims, coupled with her lawsuit, would affect her ability to be a fair and impartial juror.

Finally, as a last resort, Moore accuses Bi-State of "sandbagging." (R. 47). There was no sandbagging in this case.

In support, Moore cites *Doyle v. Kennedy Heating & Serv., Inc.*, 33 S.W.3d 199 (Mo.App. E.D. 2000), which involved a case where a jury foreperson intentionally failed to disclose the fact that she had previously filed for bankruptcy. Prejudice was presumed and the trial court granted the defendants a new trial, which this Court affirmed. In so holding, the Court strongly encouraged parties having knowledge about potential juror nondisclosures to raise the issue before the jury's deliberations. *Id.* at 201-202 and n. 1.

Moore makes much of Bi-State's "DAVID" computer system, which he asserts, could have been used to discover Shands's nondisclosures during trial. His argument should be rejected. First, *Doyle* does not require attorneys to set aside trial work to conduct an exhaustive search, indeed any search, for information indicating that a juror might have lied or had failed to be forthright during voir dire. Second, Bi-State does not possess some special technology not

available to other attorneys from either the plaintiffs' or the defense bars. Mobarnet is available to everyone for such purposes. To suggest Bi-State is somehow "special" in its ability to research a juror's litigation history is misleading. Third, the Supreme Court of Missouri has held that litigants have no duty to investigate whether prospective jurors have answered questions truthfully, absent some indication that their answers are false. *Brines*, 882 S.W.2d at 140.

In Missouri, the venire takes an oath, swearing to give truthful and complete responses before voir dire. Attorneys are entitled to assume honesty and veracity on the jurors' part. Forcing lawyers to set aside trial preparation to conduct background investigations during trial on every venireperson is unrealistic and unfair. However, this is the very burden for which Moore argues, and it should be rejected.

Thus, in the alternative event the Court concludes Moore made a submissible case, which Bi-State denies, the case should be reversed and remanded for a new trial. Juror Shands's failure to disclose three prior claims against Bi-State constitutes intentional concealment, which requires a new trial on all issues.

IV. In the alternative and in the event the Court holds Bryant Moore, Jr., made a submissible case against Bi-State, the trial court erred in denying Bi-State's Motion for New Trial, because the trial court committed prejudicial and reversible error in submitting Instruction No. 5, Moore's verdict directing instruction, in that the instruction did not specify in paragraph first in what manner Moore's place of discharge from the bus was unsafe.

Moore argues Instruction No. 5 would have violated Rule 70.02(b) had it required a finding of why the place he was discharged was unsafe. (R. 50). He relies on *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458 (Mo. banc 1998), which involved the destruction of two musical instruments while in a bank's safety deposit box during the 1993 flood. After an adverse verdict, the bank complained the plaintiff's verdict director was tantamount to a "roving commission" because the instruction improperly assumed the vault containing the safety deposit boxes was not in a reasonably safe place by charging the bank with failing to move the instruments to a place of safety.

However, *Seitz*, a bailment case, is inapplicable. Bi-State's complaint focuses on the instruction's failure to give the jury proper guidance as to why, if at all, the location where Moore was discharged was unsafe. (A. 59-60). Here, Moore lodged a myriad of criticisms about the location. However, his instruction provided the jury no guidance and required no specific findings about the location's safety before permitting the jury to find that Moore was discharged at unsafe location.

Moore attempts to distinguish *Ricketts v. Kansas City Stock Yards Co. of Maine*, 484 S.W.2d 216 (Mo. banc 1972), and *Enloe v. Pittsburgh Plate Glass Co.*, 427 S.W.2d 519 (Mo. 1968). These cases, Moore asserts, are inapplicable because they involved allegations of negligent property maintenance rather than "active negligence." (R. 52-54). Moore's argument misses the point. The reason *Ricketts* and *Enloe* are instructive is because the issue of the defendants' negligence depended upon the condition of the property. This case is no different, namely, Instruction No. 5 failed to identify what was the condition of the stop that made it unsafe.

RESPONDENT'S CROSS-APPEAL

I. The trial court did not err in submitting the issue of comparative fault to the jury in that the childhood presumption does not apply to Moore due to his age; the presumption was rebutted; and the point has been waived because it has not been preserved for appellate review.

Moore argues the trial court erred in instructing the jury on his comparative fault due to a rebuttable presumption, under Illinois law, that children between seven and fourteen are incapable of negligent conduct. Moore's cross-appeal should be denied.

Moore's cross-appeal should be dismissed for want of appellate jurisdiction. This Court never docketed his appeal. Here, Moore failed to perfect his appeal by his failure to pay the docket fee at the time he filed his notice of appeal in the trial court. *Kattering v. Franz*, 231 S.W.2d 148, 150 (Mo. 1950).

Moreover, while Moore is correct that there is a rebuttable presumption that children between the ages of seven and fourteen are incapable of contributory negligence, the presumption ceases on one's fourteenth birthday. *Dickeson v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 220 N.E.2d 43, 49 (Ill. App. 1965).

> While a child under the age of 14 years is presumed free of contributory negligence, the jury may find that a child of 14 years or older is free from contributory negligence in any given instance. 'It is firmly established that in determining the question of due care the

> factors of experience, intelligence, and capacity must be considered in the case of a minor over 14 years of age.'

Id. (citations omitted) (ruling that a child of 14 years and 4 days was not entitled to the presumption).

Thus, as a matter of Illinois law, the submission of contributory negligence was appropriate. It is undisputed that Moore was over fourteen at the time of his accident. (T. 359, 497).

Finally, if the presumption were applicable, the evidence demonstrates the trial court did not err in submitting Moore's fault to the jury because the presumption was rebutted. Moore was a bright young man. The whole purpose of Moore riding the Bi-State bus was to permit him to take a college preparatory class of his own volition. (T. 331, 352). He was also well-educated and experienced on traffic safety. (T. 363-66, 495-97). Both his mother and father instructed Moore on safely crossing the street. (*Id.*). Neither parent had any concern about Moore's ability to do so. (T. 365, 497). His father knew Moore crossed Fifth and Missouri, a busy intersection, to reach the Metrolink. (T. 365). His father explained that his son was fully aware of his instructions about the rules of the road. (T. 366). Indeed, every weekend, Moore took the Metrolink to St. Louis Centre without adult supervision. (T. 354). Since age eight or nine, Moore was permitted to ride the bus and Metrolink unsupervised. (T. 496). His mother was so confident in Moore's competence and maturity that she entrusted him to accompany his younger sister on the bus and Metrolink. (*Id.*).

Under these circumstances, no error resulted from the trial court's submission of Moore's comparative fault. Moore's cross-appeal, which was never perfected, should be denied.

CONCLUSION

Defendant, Bi-State Development Agency, respectfully requests the Court to reverse the trial court's judgment and to remand the case to the trial court with instructions to enter judgment in Bi-State's favor as a matter of law. Alternatively, Bi-State requests the Court to reverse the trial court's judgment and to remand the case for a new trial on all issues.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of appellant's reply brief and a disk containing same were deposited on this 22nd day of April, 2002, in the United States Mail, postage prepaid, addressed to: Mr. Richard E. Banks, Banks & Associates, P.C., Attorneys for Plaintiffs, 8000 Maryland Avenue, Suite 1260, St. Louis, Missouri 63105; and to Mr. Jeffrey P. Gault and Mr. John D. Warner, Jr., Gualt & Warner, LLC, Co-Counsel for Plaintiffs, 222 S. Central, Suite 500, Clayton, Missouri 63105.

_____

T. Michael Ward #32816

Subscribed and sworn to before me this 22nd day of April, 2002.

_____

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that appellant's reply brief complies with the limitations of Eastern District Rule 360, contains 3845 words, and that the computer disk filed with appellant's reply brief under Rule 84.06 and Eastern District Rule 361 has been scanned for viruses and is virus-free.

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T. Michael Ward #32816

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